



GSA New England Region

(b) (6)

MEMORANDUM FOR MARTHA N. JOHNSON
ADMINISTRATOR (A)

FROM: GLENN C. ROTONDO
ACTING REGIONAL ADMINISTRATOR (1A)

SUBJECT: Cost Accounting Standards (CAS) Waiver Request
for ARRA Modernization Project, M.C. Smith FB, Bangor, ME

EXECUTIVE SUMMARY

This memorandum requests a formal waiver of the Cost Accounting Standards (CAS) in the contracts for the Modernization Project, M.C. Smith FB, Bangor, ME. Awarding this construction contract, which will be funded by the American Recovery and Reinvestment Act of 2009 (Public Law 11-5) (Recovery Act), using the Construction Manager as Constructor (CMc) delivery method with a guaranteed maximum price (GMP), will enable an expedited procurement. Because the GMP contracting method is not a type of fixed price contract that is exempt under 48 CFR 9903.201-1, the contractor's accounting systems must meet the CAS requirements set forth in 48 CFR Part 99 unless a waiver is granted. We are seeking the waiver because requiring CAS compliance increases administrative costs for the contractor and the Government. Furthermore, CAS compliance will discourage participation by the pool of qualified contractors capable of offering on each contract. In lieu of CAS, each contractor will be required to maintain and disclose financial records that comply with generally accepted accounting principles.

Because the benefits of waiving CAS exceed the resulting risks assumed by the General Services Administration (GSA), we request the Administrator's approval for a waiver of CAS requirements for the Project, submitted pursuant to General Services Administration Acquisition Manual (GSAM) Subpart 30.2, Section 530.201-5.

I. BACKGROUND

A GMP contract type is used extensively in the commercial marketplace for large complex construction projects. This contract type implements a project delivery method that engages the construction contractor during the design phase of the project and establishes a limit on the eventual construction price before construction documents are completed. These contracts, referred to as Construction Manager as Constructor (CMc) contracts in GSA's Public Buildings Service (PBS), have an adjustable price based upon a Contractor's actual costs subject to a ceiling on adjustments (the GMP), and may include an incentive recoverable for completing the work at an actual cost less than the GMP. GSA has developed a clause for CMc contracts that adopts a pricing methodology substantially identical to that

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of the Fixed Price Incentive contracts described in the FAR 16.403. Under the CMc clause, determination of the contractor's compensation will be based upon determination of its actual costs of performance. Public Law 100-679 (41 U.S.C. §422) requires that nonexempt contracts comply with CAS. Because the CMc delivery method is a nonexempt contract, the CMc contract must include CAS unless a waiver is granted.

GSA believes that the CMc delivery method is ideal for the Modernization Project at the M.C. Smith FB, Bangor, ME (hereinafter referred to as the "Project") due to its complexity and size. Additionally, because it is funded by the Recovery Act, the construction contract must be awarded no later than **March 31, 2010**. GSA is utilizing the CMc delivery method in lieu of the traditional firm, fixed price to obtain the necessary construction services.

The Margaret Chase Smith Federal Building and Courthouse is 3-story reinforced-concrete structure built in 1967, which has not had a major renovation since its construction. The Postal Service is vacating the building, leaving 42,000 rsf or 33 percent of the space vacant. This proposed project will recapture the vacant postal space and provide space alterations for expanding and housing new tenant agencies. Some Courts spaces will be renovated. The project will repair/replace HVAC systems, improve energy efficiency, and provide exterior structural improvements including the replacement of windows. A new secure elevator will be added to improve Court safety. Other components of the project include repairs/replacements of electrical systems, improvements to existing elevators, addition of a new public elevator, upgrading the fire protection system to current code, installing sprinklers, and bringing the building into compliance with accessibility standards. The primary tenants are the District and Bankruptcy Courts, the U.S. Attorney, and Senators Collins and Snowe.

The CMc method will facilitate the success of the Modernization Project at the M.C. Smith FB. The contractor will be on board during the completion of the design phase and will provide constructability reviews and cost estimate confirmation and reconciliation. The CMc method will allow the contractor to break out certain packages and begin shop drawings prior to the overall completion of the design. Long lead items required early in the construction phase could also be ordered earlier. This approach minimizes the exposure to both parties and ensures that GSA obtains exactly what it wants. Moreover, market information indicates that contractors support CMc delivery method.

In order to use the CMc delivery method and obtain the benefits described above, GSA requires a waiver from CAS requirements for this project.

II. APPLICABILITY OF CAS AND REQUIREMENTS FOR WAIVER

A. Applicability of CAS

Congress required the establishment of CAS to ensure the utilization of uniform and consistent accounting procedures for large cost-reimbursement defense contracts where the United States was the primary customer of the contractor. Public Law 100-679 (41 U.S.C. §422) requires full CAS compliance for nonexempt contracts exceeding \$50 million and modified CAS compliance for contracts less than \$50 million.

48 CFR 9903.201-1 generally exempts from CAS requirements fixed price contracts for which the reliability of a contractor's accounting systems is not expected to affect the determination of a contractor's compensation. Fixed price incentive contracts defined at FAR 16.403, however, are not exempt. Because the CMc with GMP delivery vehicle adopts the pricing methodology of a fixed price incentive contract, the contractor's compensation is ultimately dependent upon a determination of the contractor's costs of performance and the contract would not fall under any of the exempt categories of contracts.

B. Waiver

FAR Part 30 describes policies and procedures for applying the Cost Accounting Standards Board (CASB) rules and regulations set forth at 48 CFR Chapter 99. Under FAR 30.201-5(b), the Head of an Agency may waive CAS requirements for individual contracts or subcontracts 1) less than \$15 million for contractors primarily engaged in the sale of commercial items who have no contracts or subcontracts that are subject to CAS; or 2) any contracts greater than \$15 million when the benefits from waiving CAS requirements outweigh the risks associated with granting the waiver.

III. FINDINGS

I hereby find that:

A. Summary

The CMc delivery method is superior to standard fixed price contracting for large complex construction projects. The nature, timing, and purpose of the services provided and the GMP pricing methodology that is integral to the CMc delivery method are expected to substantially reduce the project risks that have most affected the success of GSA's capital construction program: failure to complete the design within funding limitations and claims. But, the firms within the commercial marketplace within which CMc services are acquired are not all CAS compliant. The benefits to be derived from waiving CAS requirements for GSA's CMc contractors outweigh the risk associated with the waiver, and the Government's interests are otherwise sufficiently protected under the terms of GSA's CMc contract clause and Accounting Records clause.

B. Information Required For Individual Waiver Under FAR 30.201-5(c).

1. The amount of the proposed award

GSA has not yet solicited proposals for the Project. The Government estimate is **\$40,000,000.00**

2. Description of contract type

The CMc contract includes a firm fixed price Design Phase Services base component and a GMP priced option for Construction Services.

3. Contractor status regarding current CAS-covered contracts

No contractor is currently selected.

4. Items being procured

All of the construction phase work necessary for the Modernization Project, M.C. Smith FB, Bangor, ME.

5. Contractor willingness to perform under a CAS-covered agreement

No contractors selected. Previous experience with construction contractors indicate that there is little to no interest in performing under a CAS-covered contract.

6. Use of Cost and Pricing Data

GSA will obtain both cost and pricing data (price indices/proposals from prospective contractors, etc.) and information other than cost and pricing data in the anticipated contracts. The Pre-Construction Phase Services will be fixed price. The GMP and other pricing components for the Construction Services will be competed. These prices will be compared to the Independent Government Estimate (IGE) to help determine the reasonableness of the fixed price and the GMP estimate.

After award of the construction option, the contractor will be required to provide cost and pricing data to establish the amount of its compensation for construction phase services. The contractor will be required to disclose financial records created and maintained in accordance with an acceptable accounting system. At a minimum, the contractor will be required to maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable direct costs (less any credits). In addition, the CMc contract will require competition for each of the major construction subcontracts to ensure that costs for a majority of the work are reasonable. The contract will also mandate that the contractor and major subcontractors utilize an "open book" system so that GSA may freely examine the contractor's and its subcontractors' cost records.

The Construction Phase Option GMP amount will be competitive based on best value subcontract transactions for the actual construction effort. Commercial construction industry practice for GMP types of contracts is referred to as "open book" and requires the contractor to provide the owner access to all project/contract activity, as well as related documentation that makes up the GMP. In effect, the owner is provided all bid abstracts, bid evaluations, subcontracts, and payment records and afforded an opportunity to participate in the development of a subcontracting strategy for all major components of the work. While standard FAR construction clauses allow audits whenever necessary, typically at the conclusion of the contract after a claim is submitted, the "open book" approach in GMP makes audits largely unnecessary.

Auditing a fixed price construction contract may be more time consuming than auditing a GMP contract based on the amount of information tracked routinely and openly by the team (A/E, CMc contractor, owner), further supporting the idea that CAS requirements would offer little protection not already provided for by the GMP "open book" approach.

To further protect the Government, offerors will be required to submit information about their accounting system in their proposals to ensure that they meet certain minimum standards established by GSA, including a certification of the accounting system by an independent certified public accounting firm.

7. Benefits to the Government of Waiving CAS

FAR 16.401 states that use of a fixed price incentive contract is "appropriate when a firm-fixed-price contract is not appropriate and the required supplies or services can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance." Incentive contracts must establish "reasonable and attainable targets that are clearly communicated to the contractor" and include "appropriate incentive arrangements designed to (i) motivate

contractor efforts that might not otherwise be emphasized; and (ii) discourage contractor inefficiency and waste."

As explained herein, these conditions clearly apply to the Modernization Project at the M.C. Smith FB. However, FAR 16.403 establishes only two fixed price incentive contract types, neither of which is useable for construction. GSA has adopted the principles of the fixed price incentive contract in developing its clause for CMc delivery, including the use of a ceiling price (the GMP), reasonable targets, and incentive arrangements (placing the contractor's fee at risk if targets are exceeded and optional shared savings).

The CMc delivery method creates design/build value by enabling collaborative effort between the designer/architect and constructor to ensure that the project satisfies all program requirements and that project costs are kept within the available funding. CMc services are procured during the Design Phase of a project. The CMc contractor provides constructability reviews and reliable, market-based, cost estimate confirmation and reconciliation as the design is finalized. These Design Phase services are directed toward establishment of a baseline Estimated Cost of the Work (ECW) for the completed design. The CMc method also allows the contractor to proceed with procurement and shop drawing activities for certain components of work (such as steel and other long lead time items) prior to the overall completion of the design, allowing the contractor to further control project costs.

Additionally, the contractor's ability to fully understand the project design for pricing purposes is greater under the CMc contract than it is where the completed design is competitively bid, resulting in more reasonable and realistic pricing with less contingency risk passed on to the Government in the form of higher prices. The contractor is also able to leverage its bargaining power with the subcontractors who price the majority of the work before establishing the baseline ECW, further enabling greater project cost control.

Because the design is not finalized at the time of award, offerors competing for award of a CMc contract can only submit offers on a GMP basis. The GMP must contain a Construction Contingency Allowance (CCA) component to accommodate variability in the final construction cost, which will be based on the estimated baseline (the ECW) at the time construction commences. By basing the contractor's compensation on its actual costs, subject to the GMP, the CMc delivery method reduces financial risks ordinarily assumed by the contractor. The cost of this risk is borne completely by GSA in construction contracts either in the contingency contractors include in fixed prices, or in claims submitted after award.

PBS market surveys have indicated extensive support in the contractor community for the CMc project delivery method with GMP pricing. According to industry surveys, including CAS provisions in CMc solicitations will limit competition. Compliance with CAS requirements creates an administrative and financial burden on CMc contractors who are currently using accounting systems designed to different standards and, therefore, discourages participation in CMc solicitations. During exchanges with commercial construction industry members at GSA-sponsored meetings in July and October 2007, contractors conveyed concern that CAS compliance would cause a significant increase in prices because of the burdens of implementing an entirely new accounting system. The increased cost of complying with CAS could result in uncompetitive bids. Additionally, because the financial burden of compliance will be passed on to the Government from the successful bidder, the use of CAS may increase project costs.

If GSA adopts the CMc delivery method with a CAS waiver, GSA will not only realize the benefits inherent to the project delivery method described above, but will also benefit from the

increased competition resulting from the use of a commercially accepted contracting practice favored by construction firms.

8. Potential risk to the Government of Waiving CAS

The risk to the Government of waiving CAS for CMc contracts is that a contractor's cost accounting upon which its compensation is based will not reliably reflect its actual costs in performance of the work. GSA considers this risk to be minimal for the following reasons:

a. This risk is strictly limited by the GMP. If the contractor's costs exceed the GMP, the contractor's compensation will be limited to the GMP, which is established through price competition at award. The GMP is only adjustable under principles of equitable adjustment, and not reimbursement of actual cost. The CMc clause further limits the conditions under which the GMP may be equitably adjusted.

b. The direct costs incurred by a general contractor on a construction project are traditionally a small portion of the contractor's total costs of performance. These are the only costs for which the reliability of the contractor's accounting system may present risk. Other than the provision of laborers for miscellaneous tasks and cleanup, the contractor's primary costs are time-related - equipment, vehicle, and trailer rentals, staff salaries, etc. On many large projects, GSA's Office of Inspector General (OIG) has audited contractors' time-related costs and found contractors' accounting systems sufficiently reliable to support audit advice regarding such costs, regardless of CAS compliance.

c. The great majority of the costs to be recovered under the CMc contract are costs paid to subcontractors under fixed price subcontracts that the contractor is incentivized to award on the basis of price competition. (The CMc clause specifically prohibits the use of cost-plus-percentage subcontracts.) The only data required to verify the accuracy of these costs are the scope and price of the subcontract and the contractor's evidence of payment to the subcontractor. Therefore, the great majority of costs incurred by the contractor are highly verifiable regardless of the contractor's cost accounting system.

d. The majority of costs incurred on a construction project are labor costs. Because construction contractors and their subcontractors are subject to the Davis-Bacon Act, an added level of protection is provided by the requirement that labor hours and wages paid be certified by all firms employing non-exempt laborers on the project. The enforcement resources of the Department of Labor ensure that such data is maintained accurately.

e. The firms to whom GSA may award contracts must be found responsible by the Contracting Officer, and offerors will be required to submit as part of their offer a detailed description of their accounting system as well as their internal controls. In addition, GSA will require that offerors submit one of the following: (i) evidence of recent DCAA approval of contractor's accounting system; (ii) an internal controls verification disclosure statement prepared by certain companies to comply with Section 404 of Sarbanes-Oxley; or (iii) a certified statement from an independent CPA describing the attributes of the accounting system and verifying that the system meets specified minimum standards.

f. To ensure that a contractor's accounting system is sufficient notwithstanding the absence of CAS compliance, PBS will include in the CMc contract the attached Accounting Records clause, which is based on the AIA CMc template (AIA A121 CMc-2003 §6.4), in place of the CAS requirements clause. The clause was developed by PBS Region 9 in consultation

with the regional OIG audit office. The clause mandates that the contractor maintain full and detailed accounts, and exercise such controls as may be necessary for proper financial management under the contract, to ensure that any claimed costs are properly allowable, allocable and reasonable. Accounting systems must provide an adequate, sufficient and appropriate method of allocating, segregating, and tracking costs and maintaining separate accounts, by job order or other suitable accounting procedure, of all incurred segregable direct costs (less any credits).

g. To further minimize the risks, GSA will reserve the right, prior to the issuance of the Notice To Proceed for construction services, to examine and verify that the contractor's accounting system and controls exist and function as represented by the contractor in their proposal submission during procurement. During performance, the CMc clause requires that all contractor and subcontractor cost records be available to GSA.

h. Notwithstanding the CAS waiver, the Government will have the continued right to Terminate for Default should the contractor fail to comply with the terms of the contract (including the Accounting Records clause), and the Government will be further protected by the False Claims Act, the Truth In Negotiations Act, and the Anti-Kickback Act.

9. Date by which waiver is needed:

The waiver is needed by **February 25, 2010**, to facilitate publicizing the scope of work and the subsequent issuance of the Request for Proposals.

IV. DETERMINATION

I hereby determine that:

On the basis of the above findings, exceptional circumstances as defined in FAR 30.201-5(b) exist whereby a waiver of CAS is necessary to meet the needs of the agency in conjunction with the construction contract for the Modernization Project, M.C. Smith FB, Bangor, ME. Exceptional circumstances exist because, as described above, the benefits to be derived from waiving the CAS outweigh the risk associated with the waiver.

New England Region

Prepared by: (b) (6)
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Contracting Officer

01-06-2010
Date

CONCUR: (b) (6)
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Project Manager

1-6-2010
Date

CONCUR: (b) (6)
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Acting Director, Design and Construction Division

JAN 6/10
Date

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Regional Procurement Officer

1/6/10
Date

CONCUR: (b) (6)
GLENN C. ROTONDO
Regional Commissioner

1/11/10
Date

CONCUR: (b) (6)
GLENN C. ROTONDO
Acting Regional Administrator

1/11/10
Date

Reviewed by Regional Legal Counsel (b) (6)
Meaghan LeClerc, Regional Counsel, 1L

Central Office, PBS

CONCUR: See Attached Signature _____
TAMELA RIGGS
Deputy Assistant Commissioner
Office of Acquisition Management
Office of Organizational Resources (PGQ) _____
Date

CONCUR: See Attached Signature _____
ROBERT A. PECK
Commissioner, Public Buildings Service (P) _____
Date

Office of General Counsel

CONCUR: See Attached Signature _____
BARRY D. SEGAL
Associate General Counsel
Real Property Division (LR) _____
Date

CONCUR: See Attached Signature _____
KRIS E. DURMER
General Counsel (L) _____
Date

Office of the Chief Acquisition Officer

CONCUR: (b) (6) _____
RODNEY P. LANTIER
Acting Senior Procurement Executive _____
Date 3-23-2010

DECISION:

Approve ✓ _____

DATE: 3-23-2010

Disapprove _____

Other _____

MARTHA JOHNSON
Administrator (A)

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Central Office, PRS

(b) (6)
CONCUR: _____

TAMELA RIGGS
Deputy Assistant Commissioner
Office of Acquisition Management
Office of Organizational Resources (PGQ)

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CONCUR: _____

ROBERT A. PECK
Commissioner, Public Buildings Service (P)

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Real Property Division (LR)

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Date

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CONCUR: _____

KRIS E. DURMER
General Counsel (L)

2/16/2010
Date

Office of the Chief Acquisition Officer

CONCUR: _____
DAVID A. DRABKIN
Senior Procurement Executive

Date

DECISION:

Approve _____ DATE: _____

Disapprove _____

Other _____

STEPHEN R. LEEDS
Acting Administrator (A) _____

Accounting Records Clause

(a) The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Contract; the accounting and control systems shall be satisfactory to the Government. The Government and the Government's accountants or Government's authorized representative shall be afforded access to and shall be permitted to audit and copy the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Project, and the Contractor shall preserve these for a period of three years after the final payment, or for such longer period as may be required by law.

(b) The records subject to audit, examination, and copying include, but are not limited to, accounting records, written policies and procedures, subcontract files (including all proposals from all bidders, and bid recaps, etc.), estimates and takeoff sheets, correspondence, change order files (including all proposals and estimates, supporting documentation, and documentation covering negotiated pricing regardless of whether the work was performed on a lump-sum, cost plus, or unit price basis), backcharge logs and related supporting documentation, general ledger entries detailing cash and trade discounts, insurance rebates, and discounts, purchase orders, leases, contracts, commitments, notes, daily diaries, superintendents reports, drawings, and all other documents and sources of information and matters which may, in the Government's sole discretion, have any bearing on, or pertain to any matters, rights, duties, obligations related to the Contract Documents (all of the above hereinafter referred to as "Records"). The foregoing Records shall be subject to inspection and audit by the Government or its authorized representative for, but limited to evaluating and verifying: (1) Contractor compliance with Contract requirements; (2) Compliance with pricing Change Orders, invoices, Applications for Payment, or claims submitted by the Contract Manager or any of its Subcontractors at any tier, vendors and suppliers. In addition, Records subject to audit and examination shall also include those records necessary to evaluate and verify all direct and indirect costs, including overhead and payroll tax and fringe benefit allocations, as they may apply to costs associated with the Contract.

(c) If requested by the Government, the Contractor shall promptly deliver to the Government or its designee copies of all Records related to the Project, in a form acceptable to the Government. The Contractor shall provide to the Government or its authorized representative such Records maintained in an electronic format in a computer readable format on data disks or suitable alternative computer data exchange formats.

(d) The Contractor shall include similar provisions in its Subcontractor Agreements which require the Subcontractor and Sub-subcontractor to keep Records and to permit audits by the Government as is required of the Contractor.

(e) The Government and its authorized representatives shall have access to the Contractor's facilities, shall be allowed to interview all current and former employees to discuss matters pertinent to the Contract, and shall have access to all necessary Records and to be provided adequate work space, in order to conduct audits and examinations.

(f) If any audit or examination of the Contractor's Records discloses total findings resulting in overpricing or overcharges by the Contractor to the Government in excess of one-quarter percent of the total contract billings, in addition to repayment of the overcharge, the actual cost of the audit shall be reimbursed to the Government by the Contractor, unless otherwise agreed to by the Government and the Contractor.

(g) The Government shall be entitled to audit all Change Orders, including lump-sum Change Orders, to determine whether the proposed costs as represented by the

Contractor and any of its Subcontractors are in compliance with the Contract. If it is determined that the costs proposed under a Change Order, including lump-sum Change Orders, are not in compliance with the Contract, the Government reserves the right to adjust the amount previously approved and included in the Change Order.

(h) If the Contractor fails to comply with any conditions in the Accounting Records Clause, the Government is entitled to withhold up to 20% from each payment request submitted by the Contractor until such deficiencies are corrected.

(i) These requirements regarding accounting records shall not mitigate, lessen nor change any other requirements in the Contract regarding audits, payment submissions, records, or records retention.